In the Supreme Court of the United States.

OCTOBER TERM, A. D., 1904.

No. 18.

THE CREEDE AND CRIPPLE CREEK MINING AND MILLING COMPANY, PETITIONER,

vs.

THE UINTA TUNNEL MINING AND TRANSPORTATION COMPANY, RESPONDENT.

Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

SUPPLEMENTAL BRIEF OF PETITIONER.

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The assignment of this case for re-argument has suggested this addition to the briefs upon which it was previously submitted. Our purpose is to cover a little more fully some of the arguments hitherto advanced for the petitioner, rather than to introduce new lines of discussion. If the task is deemed unnecessary, we may be excused for its performance by pleading the importance of the issues involved, which

have been emphasized by the action of the court in requiring its re-argument.

THE GRANT OF THE PATENT.

The patent from the government to the petitioner is in the usual form, and contains the usual conditions and exceptions, *and those only.* They are:

> "First. That the premises hereby granted, with the exception of the surface, may be entered by the proprietor of any other vein, lode or ledge, the top or apex of which lies outside of the boundaries of said granted premises, should the same in its dip be found to penetrate, intersect or extend into said premises, for the purpose of extracting and removing the ore from such other vein, lode or ledge.
>
> "Second. That the premises hereby granted shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local laws, customs and decisions of the courts. And there is reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by the authority of the United States.
>
> "Third. That in the absence of necessary legislation by congress, the legislature

of Colorado may provide rules for working the mining claim or premises hereby granted, involving easements, drainage and other necessary means to its complete development."

The analogy suggested by his honor, Judge Sanborn, between the decisions of the Ninth circuit in cases involving dip rights between veins patented to different lode claims, and the principle applied by him to the case at bar, disappears when it is considered that in the one case external evidence as to the actual date of the discovery was admitted to determine which of two patented lodes containing the same exception should prevail; whereas, the decision in the case at bar incorporates a new and distinct exception in the patent, not appearing in its recitals, not justified by its terms, and not warranted by the law. If it prevails, a fourth condition is incorporated in the patent, reading virtually as follows:

> "That the premises hereby granted may be entered by the proprietor of any tunnel located across the same at any time after its location and before its entry, either to drive said tunnel across said premises for the discovery of veins not previously known to exist therein, or for the pursuit of such veins and the operation thereof beyond said premises. And all veins intersected by said tunnel within said premises not know to exist previous to the location of said tunnel are hereby excepted from this grant, and the same shall belong to and become the property of the proprietor of such tunnel."

Such an exception can find no support in the statute, nor in any section thereof, nor in any decision construing it. Section 2323 provides that:

> "Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within 3,000 feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel or veins or lodes not appearing on the surface made by other parties after the commencement of the tunnel shall be invalid," etc.

No vein not previously known to exist, or otherwise, was ever discovered in respondent's tunnel within petitioner's ground. This court has said the tunnel owner has no right of way by implication. The lode claims were located prior to the tunnel, yet it is held that our patent means less than it says, and conveys less than it purports to grant.

It has been frequently held that the land office can not insert conditions or exceptions not authorized by law in a patent.

> Deffeback vs. Hawke, 115 U. S., 392.
> Clary vs. Hazlitt, 67 Cal., 286; 7 Pac., 701.
> Talbot vs. King, 6 Mont., 76; 9 Pac., 434.
> Silver Bow Co. vs. Clarke, 5 Mont., 378; 5 Pac., 570.

Davis vs. Weibbold, 139 U. S., 527.

Smokehouse Lode Cases, 6 Mont., 397; 12 Pac., 858.

1 Lindley on Mines, 171.

If the reservation intruded into the patent by the Court of Appeals had been inserted in terms by the land department, the courts would have stricken it out. That which can not be expressly excluded from our grant can not be excluded therefrom by construction or implication.

Some years ago attempts were repeatedly made to make patents for lodes, covered by townsites, subject to the rights conveyed by the townsite patent, or claimed by squatters. These attempts were founded upon alleged fraud in securing the lode patents, in showing either that no lodes or minerals were included within their boundaries, or that the rights of the assailants pre-dated the patents and were known to the lode patentees. These claims were sought to be founded, as they are here, upon statutory provisions, but in every instance, so far as we know, they have been rejected, even where, as in the Smokehouse cases, the lode patents contained express exceptions covering the alleged rights contended for. And practically all of them assert the fundamental proposition that in actions at law the patent is conclusive evidence of the efficiency of the location.

Talbot vs. King, supra.

Davis vs. Weibbold, supra.

Chambers vs. Jones, 17 Mont., 156; 42 Pac., 758.

U. S. vs. Iron Silver M. Co., 128 U. S., 673.

Montana Railway Co. vs. Migeon, 68 Fed., 811.

Iron Silver M. Co. vs. Campbell, 17 Colo., 276.

Justice M. Co. vs. Lee, 21 Colo., 260; 52 Am. St. Rep., 216.

Every reason advanced for these decisions applies with added force to conditions here presented. The respondent does not so much as claim a vein discovered in our ground. It expressly declares it has not done so. It claims to have made some discoveries elsewhere since the commencement of this action, and it has bought a claim called the Black Jasper, located from the surface, and containing a small fraction of an acre, which it declares it can work by using our premises as a thoroughfare, because, forsooth, it is not concluded by our patent.

If the Court of Appeals is correct, and the respondent may show that the petitioner's grantors discovered no vein in their locations prior to the tunnel location, so far as they may contain "veins not previously known to exist discovered in such tunnel," the patent does not cure the difficulty; and hence, if there be but one vein in each claim, and those the discovery claims respectively, and not appearing at the surface, which the tunnel intersects, they belong to respondent, notwithstanding they are the identical veins patented in terms to the petitioner, the discovery of which the patent conclusively establishes.

We may put this proposition in another form. By our patent we are protected down to the date of entry.

But respondent shows that the day before entry we discovered a vein which is the vein patented, which was not previously known to exist. It is the only vein in the claim, and it is also discovered by the tunnel. Judgment must be for respondent, and our patent is worth less than the parchment on which it is written.

This illustration is in no sense imaginary. Lode claims seldom embrace more than one vein, and those veins rarely appear at the surface. They must be discovered by excavation before they are known to exist. If, in the case at bar, the petitioner's grantors did not make their discovery of such a vein between January 2d and January 13, 1892, they are at the mercy of the respondents, whether they made it on the 14th of January, 1892, or at any other time thereafter. Making it after, the patent is just as ineffective, for the right to such veins, if they exist at all, belongs to respondent so long as it continues work on the tunnel without reference to the nature of petitioner's title. For if such a right is destroyed by patent, there is an end to respondent's claim, and we must prevail. If not destroyed by patent, the time when respondent discovers and claims it is immaterial. There is no escape from this conclusion.

RESPONDENT'S CLAIM OUTSIDE OF STATUTE.

The petitioner's patent certainly gives it everything which section 2323 does not give to the respondent. We have seen that if properly and previously located the respondent's tunnel would have the right

of possession of veins not previously known to exist discovered in such tunnel. More than this it can not have. But we have also seen that, confessing the absence of any such thing in petitioner's territory, it demands an absolute and perpetual right of way across our claims. And in doing this it does not so much as negative the validity of our locations. For it is nowhere alleged that the Ocean Wave and Little Mary lode claims were not located upon a lode "not appearing at the surface." A location upon a lode appearing at the surface is good even though junior to the tunnel. But respondent contents itself with the broad assertion that the petitioner never at any time discovered any lode or vein within its claims. It confesses the tunnel never did, and then asks to invalidate our patent. Such a claim is wholly outside of the statute.

THE TUNNEL CLAIM.

The Court of Appeals declares that the action of the land office in granting patent to petitioner did not conclude the respondent as to any conditions antedating the entry. If privies are bound, it must follow that the respondent, being privy to the United States, possesses nothing in the land conveyed which the United States does not possess. And we have attempted to show that every reason which makes the patent conclusive from the date of entry must make it conclusive from the date of location, or it affords no protection to the patentee.

It remains to consider somewhat more at length than in our reply brief the fact that the respondent is

the owner of a tunnel *claim*, and not a tunnel *site*, a surface location, and not a tunnel line. On February 25, 1892, respondent's grantors filed for record a location certificate of the Uinta Tunnel claim, reciting that on the 18th day of February they claimed by right of location a tunnel claim, which is described by metes and bounds as a parallelogram 1,500 by 3,000 feet in dimensions, and embracing the territory covered by petitioner's patents (Transcript, pages 138-9). They thereby assumed to segregate before any discovery a large area of the public domain and exploit it with a tunnel, whose bore was placed midway of the northwest end line of the claim. This is the only location of the tunnel ever made or attempted.

The right asserted by this location was a surface one, and in conflict with every foot of territory covered by petitioner's application for patent. It was tangible, immediate and positive. Its owners were bound to assert their right to possession by adverse under the provisions of the federal statutes, and, failing to do so, their tunnel claim as to the petition was lost. It is no answer to this contention to aver that the tunnel is within the claim. The latter was recorded; it is the assertion of whatever right the locators possessed or claimed; if it was valid, the duty of adversing our application for patent existed; if it was void there was no location of the tunnel whatever, and, therefore, no right in the owners to the premises, either contingent or otherwise. Rule 18, of the land office, requires a record of tunnel sites. No such record is disclosed by the transcript; it was never made, and the location certificate set forth in the record furnishes the measure and the limit of the respondent's right.

Can such a location be said to confer a right that is uncertain, contingent or remote? If so, any surface location would be exempt from the duty of adversing a patent application for a lode claim. It may be true that such a location is not authorized by the provisions of the federal or state mining law. But some record is necessary, and we must take what we find and apply to it the requirements of the statute concerning conflicting rights of possession to surface rights on the public mineral domain.

Our entry was made in August, 1893. For four years our claims were undisturbed. Not until the respondent purchased the Black Jasper was there any assertion of a prior right to our premises, or any part thereof. Not until after the suit was brought did the respondent make any discovery of any vein with its tunnel anywhere. If the doctrine of the Ajax-Calhoun case is to be limited in its general application, this is not the case, nor is the respondent the party entitled to the benefit of the limitation.

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